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No. 01-349

In the Supreme Court of the United States

BUDDY GRAVER, ET AL
Plaintiffs-Petitioners

VERSUS

MONSANTO COMPANY, ET AL
Defendants-Respondents

From the Fifth Circuit Court of Appeal,
State of Louisiana
bearing Docket No. 01-C-55

Originating in the 29th Judicial District Court for the
Parish of St. Charles, State of Louisiana,
Suit No. 45,965, Division "D"

OPPOSITION OF MONSANTO COMPANY, ET AL TO PETITIONERS' APPLICATION FOR WRITS OF CERTIORARI AND/OR REVIEW

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QUESTION PRESENTED

Where an erroneous class certification order is subsequently reversed on appeal before official notice of certification is ever issued, the unnamed putative class members have actual notice of the reversal, and the unnamed putative class members thereafter fail to file individual claims within the relevant state limitations period, are the due process rights of these class members violated by dismissal of their late-filed claims because they did not receive official notification of the appellate court's reversal of the erroneous certification order?

PARTIES TO THE PROCEEDING

The parties to the proceeding are correctly identified in Petitioners' writ application.

CORPORATION DISCLOSURE STATEMENT

Pharmacia Corporation owns 85% of the common stock of respondent Monsanto Company. The remaining 15% of the common stock is publicly traded.

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STATEMENT OF JURISDICTION

The statement of jurisdiction was presented correctly by the Petitioners.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The relevant provisions and rules were presented correctly by the Petitioners.

OPINIONS BELOW

The Petitioners' discussion of the lower court opinions contains a significant error. Specifically, Petitioners incorrectly state that this action was "decertified" by the Louisiana Supreme Court. Writ Application at 1. To the contrary, the Louisiana Supreme Court, via supervisory writ, simply reversed the erroneous holdings of the district court (and court of appeals) that had initially improperly certified the action as a class action. Thus, this action was not "decertified" after having properly been certified initially; rather, the Louisiana Supreme Court found that it was never a properly certified class action in the first place.

STATEMENT OF THE CASE

The Petitioners' statement of the case should be corrected as follows. First, as discussed in the Opinions Below section of this opposition, this action was not "decertified" by the Louisiana Supreme Court; rather, that court simply

reversed the lower courts' erroneous certification order. Second, for the reasons set forth more fully in the Argument section of this opposition, Respondents disagree with Petitioners' statement that "there existed a constitutional due process requirement requiring decertification notice to the affected class members." Writ Application at 4.

Additionally, Petitioners' statement of the case omits certain relevant facts. First, as a result of Monsanto's suspensive appeal and subsequent writ application from the erroneous certification orders of the district court and court of appeal, no notice of class certification was sent to the unnamed putative class members prior to the Louisiana Supreme Court's decision reversing the certification order. Accordingly, the putative class could not have relied upon such notice from any court. Second, the record demonstrates that the unnamed putative class members received actual notice of the decision. Specifically, when asked by the district court why the 100+ supplemental plaintiffs had not filed their amended petition sooner, counsel did not claim that the proposed plaintiffs did not know about the reversal of the erroneous class certification order, but rather responded that

> the simple answer, Your Honor, is these people began to get worried, began to get discouraged, did not want to consider pursuing individual claims. As you know, we're going to have 123 individual claims to present to the Court, but ultimately they did make the decision ....

Transcript of Proceedings of Exception of Prescription on Plaintiff's Third Amended and Supplemental Petition at 11.

Thus, the proposed plaintiffs, by counsel's own admission, knew that the court had held that the action could not proceed as a class action, and their delay in attempting to amend their petition was due solely to their doubts about whether to file individual claims. It is also important to note that the putative class in this case was not a large, geographically dispersed group of people, but rather a relatively small, geographically compact group, all of whom are represented by the very same attorneys who represent the named plaintiffs – the same attorneys who undisputedly received notice of the supreme court's denial of class certification.

ARGUMENT

PRESCRIPTION ACCRUED ONE YEAR FROM THE DATE OF THE LOUISIANA SUPREME COURT'S DENIAL OF CLASS CERTIFICATION, AND NOTICE OF THE DENIAL WAS NOT REQUIRED BY THE DUE PROCESS CLAUSE

It is undisputed that under both Louisiana and federal law, the filing of a class action petition "tolls" the running of the prescriptive period/statute of limitations with regard to all putative class members, whether named or unnamed. See Williams v. State, 350 So. 2d 131, 137 (La. 1977) (Louisiana law); Smith v. Cutter Biological, 770 So. 2d 392, 409-10 (La. App. 2d Cir. 2000) (Louisiana law); American Pipe and Constr. Co. v. Utah, 94 S. Ct 756, 766 (1974) (federal law). Under Louisiana law, the "tolling" is in the nature of an interruption rather than a mere suspension of the prescriptive period; thus, once the interruption ceases, the former

putative class members have the full original prescriptive period in which to file their individual claims.[1] See Orleans Parish School Bd. v. U.S. Gypsum Co., 892 F. Supp. 794 (E.D. La. 1995), aff'd, 114 F.3d 66 (5th Cir. 1997). The substantial body of federal cases (including three Supreme Court decisions), as well as the only Louisiana decision to address the issue, make it clear that the "tolling" caused by the filing of a class action petition ceases upon the court's denial of class certification. See Chardon v. Fumero Soto, 103 S. Ct. 2611, 2618 (1983); Crown, Cork & Seal Co. v. Parker, 103 S. Ct. 2392, 2398 (1983) ("Once the statute of limitations has been tolled, it remains tolled for all members of the putative class **until class certification is denied**. At that point, class members may choose to file their own suits . . . ."); American Pipe, 94 S. Ct. at 770 (stating that "the commencement of the class action in this case suspended the running of the limitation period only during the pendency of the motion to strip the suit of its class action character," and holding that the limitation period began to run again upon entry of the order denying class certification); Armstrong v. Martin Marietta Corp., 138 F.3d 1374, 1382 (11th Cir. 1998) (*en banc*) (concluding that "the tolling of the statute of limitations ceases as soon as the district court denies class certi-

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[1] In contrast, the law of other jurisdictions may provide for either suspension of the limitations period, in which case the former putative class members must file suit within the amount of time left in the limitation period on the day on which tolling took place, or an extension of the limitations period, in which case the former putative class members have a fixed period after tolling ceases during which to file suit. See Chardon v. Fumero Soto, 103 S. Ct 2611 (1983); Kathleen L. Cerveny, "Note: Limitation Tolling When Class Status Denied: Chardon v. Fumero Soto and Alice in Wonderland," 60 Notre Dame L. Rev. 686, 689-90 (1985).

fication"); Cf. Smith, 770 So. 2d at 409 ("At the very latest, prescription began to run again when the district judge ... actually entered the order of decertification").

Despite the clear and uniform holdings of these cases, Petitioners argue that the interruption ends not upon denial of class certification, but rather upon official, court-generated notice of the class certification denial, which, Petitioners claim, is required by the due process clause.[2] However, Petitioners have failed to cite a single case or any other authority to support the proposition that due process requires notice of a class certification denial.[3] Like Petitioners, Monsanto has been unable to locate any such case or authority.

The absence of a single case supporting Petitioners' argument, while a significant indicator that no such due process right exists, is not the only basis for such a conclu-

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[2] Petitioners concede that, prior to the 1997 amendments to Louisiana's class action articles, there was no statutory provision requiring official "class notice" of an order denying class certification. Petitioners also concede that the 1997 amendments do not apply to the present action, which was filed before the effective date of the amendments. Thus, Petitioners' argument is predicated solely upon the due process clause of the Constitution.

[3] The one case cited by Petitioners in their writ application concerns **discretionary** notice under Federal Rule of Civil Procedure 23(d)(2), not the due process clause. See Hardy v. Vought Corp., 30 Fed. R. Serv. 2d 484 (N.D. Tex. 1979). Similarly, Petitioners' citation to the Newberg class action treatise is also unavailing because the quoted language dealt with a true "decertification" rather than a denial of certification like that involved in the present case.

sion; the conclusion is implicit in both the existing jurisprudence on the issue of class action tolling as well as the federal statutory law governing class actions. With regard to the tolling jurisprudence, the cases cited above uniformly hold that tolling ceases upon denial of class certification, and not one of these cases mentions any necessity for issuance of notice of the class certification denial. This was true even in American Pipe, in which the class action filing had only suspended the running of the statute of limitations, giving the unnamed putative class members just 11days after the denial of class certification in which to file their individual claims. See 94 S. Ct. at 770. See also Chardon, 103 S. Ct. at 2611 (holding that after class certification is denied, the federal interest in assuring the efficiency and economy of the class action procedure that constitutes the basis for the tolling rule "is vindicated as long as each unnamed plaintiff is given as much time to intervene or file a separate action as he would have under a state savings statute applicable to a party whose action has been dismissed for reasons unrelated to the merits.")

With regard to the federal statutory framework for class actions, the absence of a due process requirement for notice is supported by the fact that there is not even a statutory requirement for notice of a court's denial of class certification. Federal Rule of Civil Procedure 23 requires notice to a class in only two instances: subsection (c)(2) requires notice of an order certifying a class under Rule 23(b)(3), and subsection (e) requires notice of "dismissal or compromise" of a class action. In addition to these two provisions for mandatory notice, Rule 23 contains a provision that allows for discretionary notice in other instances. This provision, contained in subsection (d)(2), states that the

court "may make appropriate orders ... (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action Thus, despite requiring the issuance of notice in other circumstances, Rule 23 does not provide for mandatory notice of denials of class certification, which would certainly be expected if such notice were required by the due process clause as Petitioners claim.

While there are no federal cases holding that due process requires notice of class certification denial or similar rulings, there are several cases that discuss such notice outside of the due process context. The majority of these cases have considered the notice issue under Rule 23(d)(2), the discretionary notice provision.[4] Some of the cases in which the courts have utilized this discretionary power to require notice of an order similar to denial of class certification (such as an order narrowing of the scope of the putative class) have involved true instances of "decertification" - i.e., the action had previously been properly certified as a class action, then was later decertified by the district court on the basis of subsequent developments, such as the failure of the class representative to prosecute the action vigorously. See, e.g., Hardy v. Vought Corp., 30 Fed. R. Serv. 2d 484 (N.D. Tex. Apr. 2, 1979). Such cases are clearly distinguishable from the present action, which was never properly certified

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[4] Most courts hold that, in circumstances like the present case, Rule 23(e)'s mandatory notice provision is inapplicable because that provision applies only to voluntary, as opposed to involuntary, dismissals. See, e.g. Diaz v. Trust Territoly of Pacific Islands, 876 F.2d 1401, 1406 (9th Cir. 1989).

as a class action and in which notice of class certification was never promulgated. See Fed. R. Civ. P. 23 (Advisory Committee Notes) ("A negative determination [with regard to class certification] means that the action should be stripped of its character as a class action.")

In other cases involving the federal courts' discretionary power under Rule 23(d)(2) at the precertification stage, the courts have emphasized that notice is not necessary absent the likelihood of prejudice to the unnamed class members that would result from the absence of such notice. For example, in Bernard v. Gulf Oil Corp., 890 F.2d 735, 746 (5th Cir. 1989), the court held that discretionary notice is encouraged where unnamed class members: (1) received notice of their initial inclusion in the class; (2) relied on the class suit to protect their interests; and (3) would be prejudiced as a practical matter by their exclusion from the class. There, the court found that the plaintiffs had failed to demonstrate that these three elements were satisfied and declined to require notice of the court's narrowing of the scope of the class. See id. With regard to the question of prejudice, as a general matter the courts have been unwilling to find the requisite prejudice in light of the rule that the filing of a class action petition tolls the running of prescription. See, e.g., Marian Bank v. Electronic Payment Servs., Inc., No. 95-614-SLR, 1999 WL 151872 (D. Del. Mar. 12, 1999) (in holding that notice of denial of class certification was not required, the court reasoned that American Pipe's tolling rule "does not compel notification of putative class members upon the denial of class certification" and that "[i]f these potential plaintiffs have relied upon plaintiff to represent their claims, it is their duty, not the court's, to

keep apprised of the legal developments in plaintiff's case. The court has no obligation to awaken potential litigants for their lethargy."); Wallican v. Waterloo, 80 F.R.D. 492, 494 (N.D. Iowa 1978) (notice of voluntary dismissal at pre-certification stage was not required; putative class members' rights were not prejudiced or adversely affected because the dismissal occurred well within the statute of limitations period so that the putative class members could still bring suit on the same controversy); Bantolina v. Aloha Motors, Inc., 75 F.R.D. 26, 33 (D. Haw. 1977) (notice of withdrawal of motion to certify after initial granting of certification but prior to issuance of class notice was not required because "[t]he tolling of the statute of limitations eliminates the danger of prejudice to the unnamed members of the class," who could file their own suits). See also Diaz, 876 F.2d at 1407 ("Since American Pipe, courts have moved away from the idea that notice is required for all pre- certification dismissals"). [5]

In the present case, the Louisiana Supreme Court determined that this action is not, and thus has never been, properly certified as a class action. While the district court erroneously certified the class initially, official notification of the district court's order was never issued to the putative class. Thus, this is not a situation in which a class was properly certified, thereby creating class-related duties upon the

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[5] While the court ultimately required notice in Diaz, it did so only because the dismissal at issue there was a voluntary dismissal upon stipulation of the parties. The court reaffirmed the rule that "if the court determines for any reason that class certification should be denied, it can thereafter dismiss the class allegations without notice. In other words, Rule 23(e) notice is not required where the dismissal is involuntary." 876 F.2d at 1406.

court and the named plaintiffs, and officially brought to the attention of unnamed class members, thereby inducing them to rely upon the continued prosecution of the class action to pursue their own claims.

Further, even under the test used by the federal courts to determine whether **discretionary** notice should issue in a given case, notice would not have been required in the present case. Even assuming for the sake of argument that the unnamed putative class members initially received notice of filing of the suit or even informal, extra-judicial notice of the district court's erroneous class certification,[6] there is simply no evidence that they relied upon the class action to protect their interests or that they would be prejudiced by their exclusion from the class. First, under Louisiana law the excluded putative class members had the entire prescriptive period, i.e., one full year, from the supreme court's denial of class certification in which to file individual claims. As discussed more fully above, the federal courts have refused to find prejudice even where the excluded putative class

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[6] There is no evidence in the record demonstrating that the unnamed 123 putative class members received such notice, although the statements of counsel during the hearing on Monsanto's prescription exception indicates that they received notice not only of the initial filing and erroneous certification order, but also of the supreme court's decision denying class certification. In any event, if it is assumed that they received notice of the filing and erroneous class certification, there is no reason not to assume that they also received notice of the supreme court's denial of class certification, particularly in light of the fact that the putative class is relatively small, geographically concentrated, and is represented by the very same attorneys who have represented the named plaintiffs throughout this action.

members had only a few days in which to file their claims after the denial of certification. Second, Petitioners' counsel himself has indicated that the unnamed putative class members received actual notice of this Court's denial of class certification. Specifically, when asked by the district court why the 123 supplemental plaintiffs had not filed their amended petition sooner, counsel responded that

> [a]nd the simple answer, Your Honor, is these people began to get worried, began to get discouraged, did not want to consider pursuing individual claims. As you know, we're going to have 123 individual claims to present to the Court, but ultimately they did make the decision.

Transcript of Proceedings of Exception of Prescription on Plaintiff's Third Amended and Supplemental Petition at 11. Thus, counsel did not claim then (and has not claimed at any point in this proceeding) that the unnamed putative class members lacked actual notice of the supreme court's decision. It is also important to note that the putative class in this case was not a large, geographically dispersed group of people, but rather a relatively small, geographically compact group, all of whom are represented by the very same attorneys who represent the named plaintiffs - the same attorneys who undisputedly received notice of the supreme court's denial of class certification. Of course, where actual notice is present, there can be no prejudice, and concomitantly no due process violation, resulting from a failure to issue official notice. See, e.g., Bijeol v. Benson, 513 F.2d 965, 968 (7th Cir. 1975) (holding that "in the circumstances of this case, in which the class, as we redefine it, consists of prisoners in a

given category in one penitentiary and the likelihood is that all prisoners in the represented class were in fact informed about the action, due process did not require notice.").

Thus, due process did not require official notice of the supreme court's denial of class certification, and even if such notice had been required as a general matter, there was no due process violation in the present case because the unnamed putative class members received actual notice of the denial of class certification. The interruption ceased, and the one-year prescriptive period began to run again, on January 8, 1999, when the supreme court denied class certification. The Third Amending and Supplemental Petition was not filed until almost 21 months later, on October 3, 2000, and is therefore prescribed. The due process clause is inapplicable here with regard to the unnamed putative class members who simply "slept on their rights" after the supreme court's denial of class certification while deciding whether to file individual suits. See American Pipe, 94 S. Ct. at 756 (noting policy against rewarding plaintiffs who "sleep on their rights"). Consequently, the court of appeal properly vacated the district court's ruling and granted Monsanto's exception of prescription.

CONCLUSION

The unnamed putative class members simply cannot advance any valid reasons, legally or factually, for waiting twenty-one months to file their individual claims after the Louisiana Supreme Court denied class certification. While the result may at first glance appear harsh, as the trial court itself recognized, it is the result of Petitioners' own making. As a matter of law, their claims are prescribed, and there is no due process violation. Thus, the court of appeal's holding is correct, and this Court should deny Petitioners' writ application.

Respectfully submitted:

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